IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 10, 2005 Session

IN RE: TKY

Appeal from the Juvenile Court for Coffee County
No. 368-99J Timothy R. Brock, Judge

No. M2004-01634-COA-R3-JV - Filed July 14, 2005

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and Remanded

The biological father of a child filed this parentage action seeking to be named the child's legal father. The action was opposed by the mother of the child and her husband, the latter of whom also seeks to be declared the "legal" father of the child. Each man is armed with a rebuttable statutory presumption of parentage. The husband of the child's mother is presumptively the legal father based upon Tenn. Code Ann. § 36-2-304(a)(1) and (4), because he was married to the child's mother when the child was conceived and born, took the child into his home and has openly held him out as his natural child. The biological father, with whom the mother had an extramarital affair, is presumptively the legal father based on subsection (a)(5) of Tenn. Code Ann. § 36-2-304, because a DNA test indicates a 99.95% statistical probability that he is the biological father. The trial court found the biological father to be the legal father based on the DNA test and the fact that he had taken action to prove his parentage. The record reveals that the biological father knew he was probably the father of the child before birth, yet he has provided no support for the child, he has no relationship with the child, and he waited almost two years before initiating any legal action to assert his legal rights. Conversely, the record reveals that the husband of the child's mother has a significant relationship with the child, has held him out as his child and has provided a loving home and financial support for the child throughout the child's life. Based on these factors we reverse and remand with instructions to enter a judgment that the husband of the child's mother is the legal father of the child.

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

J. Stanley Rogers and Christina H. Duncan, Manchester, Tennessee, for the appellants, K.Y. and D.Y.

Eric J. Burch, Manchester, Tennessee, for the appellee, T. P.

OPINION

This is the second appeal of an action commenced by the apparent biological father of a child to establish his parentage of a child, TKY, whose mother was married when the child was conceived and born. The apparent biological father is identified as Mr. P. The mother of TKY is Mrs. Y and her husband of seventeen years is Mr. Y.

Mr. P filed a Petition for Legitimation[1] in August of 1999, when the child was twenty-two months old.[2] Mr. and Mrs. Y filed an answer, denying Mr. P's claim of parental rights, along with a counter-petition wherein they asserted that Mr. Y was the "legal" father of TKY. Additionally, Mr. and Mrs. Y sought to terminate Mr. P's parental rights, if any, to TKY.[3]

The trial court elected to try Mr. and Mrs. Y's petition to terminate Mr. P's parental rights prior to considering Mr. P's parentage action. The first trial occurred in March of 2002. Following a full evidentiary hearing of the termination action, the trial court terminated Mr. P's parental rights.[4] In addition, the trial court summarily dismissed Mr. P's parentage action, holding that the ruling in the termination action foreclosed Mr. P's parentage action.

Mr. P appealed contending *inter alia* that the trial court erred by deciding the termination of parental rights issue before determining the paternity issue. This court reversed the trial court's ruling in the first trial finding that the parentage action should have been tried prior to the termination of parental rights action. *See In re TKY*, No. M2002-00815-COA-R3-JV, 2003 WL 1733583 (Tenn. Ct. App. April 2, 2003). Consequently, this matter was remanded to the trial court

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[1] Mr. P's petition is styled "Petition for Legitimation/Petition for Custody/Petition for Visitation/Petition to Set Child Support." Since 1997, Tenn. Code Ann. § 36-2-301 has identified such an action as an "action to establish parentage of children." We shall hereinafter refer to Mr. P's action as his parentage action.

[2] An action to establish the parentage of a child may be instituted before or after the birth of the child and until three (3) years beyond the child's age of majority, Tenn. Code Ann. § 36-2-306. However, Tenn. Code Ann. § 36-2-304(b)(2)(A) establishes a narrow exception that may be employed to shorten the time period to twelve (12) months:

> If the mother was legally married and living with her husband at the time of conception and has remained together with that husband through the date a petition to establish parentage is filed and both the mother and the mother's husband file a sworn answer stating that the husband is the father of the child, *any action seeking to establish parentage must be brought within twelve (12) months of the birth of the child*. Tenn. Code Ann. § 36-2-304(b)(2)(A). (emphasis added).

The foregoing exception is not at issue here.

[3] There is a second related action, a petition initiated by Mr. and Mrs. Y to terminate the legal rights, if any, of Mr. P. It is on appeal contemporaneous with this matter. It is also styled *In re T.K.Y.* but was assigned a different case number, M2004-02005-COA-R3-PT.

[4] The basis of the trial court's ruling in the first trial was that Mr. P failed to file a petition for paternity within thirty days of having notice that he may be TKY's father as required by Tenn. Code Ann. § 36-1-113(g)(9)(A)(vi).

with instructions that the trial court rule upon Mr. P's parentage action before entertaining the petition to terminate Mr. P's parental rights.

On remand, the trial court conducted a second trial, which was actually the first trial of Mr. P's parentage action. Following a full evidentiary hearing on the parentage action, the trial court ruled that Mr. P was both the "biological" father and the "legal" father of TKY.[5] Since Mr. P was not married to the child's mother, who had custody of the child, the trial court also set child support and visitation and entered a judgment for child support arrearages and previously incurred medical expenses.[6]

Mr. and Mrs. Y appealed the adverse ruling. They present three issues. First, they assert that the trial court erred in finding that Mr. P is TKY's legal father. They argue that the results of genetic testing do not end the inquiry and contend that the court must consider all relevant rebuttable presumptions of parentage found within Tenn. Code Ann. § 36-2-304. Second, if this court affirms the finding that Mr. P is the legal father, Mr. and Mrs. Y contend that Mr. P should reimburse them for the cost of TKY's insurance premium, or alternatively, should pay for all of the past medical expenses not covered by insurance. Third, Mr. and Mrs. Y contend that when setting back child support, the trial court should have considered Mr. P's income as a hairdresser as well as his in-kind income received for house sitting.[7] Mr. P also appealed. His only contention is that the trial court's award of back child support is excessive.

STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo,* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405

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[5] On remand, the trial court tried the parentage action in April 2004. This was the first and only trial of the parentage action. As for Mr. and Mrs. Ys' counter-petition to terminate Mr. P's parental rights, the trial court deferred the (second) trial of that action until a later date stating, "I'm not going to hear the termination petition today."

[6] The trial court based Mr. P's child support on an annual average income of $28,500 as a hairdresser, and child support was set at $405 a month. The court also ordered Mr. P to pay $1,108.13, representing one-half of the out-of-pocket costs related to TKY's prenatal, birthing and medical expenses. Furthermore, the court determined that Mr. P owed child support arrearages of $31,590.

[7] At the April 2004 hearing, Mr. P testified that his income for 1997 forward was somewhere around $28,500 annually. He also stated that in 2001 and 2003, he was living in a residence and maintaining it in lieu of paying rent, which he estimated to be a value of $750 a month.

(Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

THE FACTS

The facts of this case are surprisingly simple and generally uncontradicted. Mr. and Mrs. Y married in August of 1988 and are still married despite Mrs. Y's admission that she has engaged in extramarital affairs.[8] In November of 1996, while married to Mr. Y, Mrs. Y began an affair with Mr. P. In October 1997, Mrs. Y gave birth to TKY, the subject of the dispute. Mrs. Y told Mr. P of her belief that Mr. P was TKY's father prior to the birth of TKY; however, she allowed her husband, Mr. Y, who had no knowledge of Mrs. Y's extramarital affair, to believe the child was his. She did not inform Mr. Y that Mr. P was the likely father of TKY until July 7, 1999, some twenty-one months after the child's birth. DNA tests were conducted the following month, on August 2, 1999, and indicate a statistical probability of 99.95% that Mr. P is TKY's biological father. From the child's birth to the present, including after being informed that Mr. P is the likely biological father of TKY, Mr. Y has raised TKY in his home, supported the child and openly held TKY out as his child.

MR. P'S LAW OF THE CASE ARGUMENT

We first address the contention by Mr. P that the issue of his paternity is the law of the case and, thus, may not be revisited. This contention is based upon one sentence in this court's ruling in the first appeal of the termination of parental rights action. It reads, "Based on the parties' prior stipulation that Mr. P is the biological father of T.K.Y., then the Juvenile Court shall determine issues regarding the proper, primary residential parent, shared parenting, support and other issues for T.K.Y."[9] *In re TKY*, 2003 WL 1733583, at *5. We find Mr. P's "law of the case" contention to be without merit, because the sentence upon which he bases this argument is *dicta*.

In the first appeal, which was an appeal of the termination action, this court identified the issues as follows:

> There are several issues presented in this appeal. First, did the trial court err in deciding the termination of parental rights issue before determining the paternity issue? Second, did the trial court err in failing to terminate Mr. P.'s paternal rights on other grounds? Third, should this court consider the constitutional attack on T.C.A. § 36-1-113(g)(9)(A)(vi)?

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[8] She has admitted to having five affairs.

[9] Mr. and Mrs. Y's primary argument is that the trial court erred in concluding that Mr. P is the legal father. They admit that in March of 2002, during the first evidentiary hearing in this matter, they stipulated that Mr. P was TKY's *biological* father based on DNA tests showing a 99.95% probability of paternity. However, they never stipulated that Mr. P is TKY's *legal* father. The fact that Mr. P is the biological father is not conclusive.

In re TKY, 2003 WL 1733583, at *1.

The case at issue here is Mr. P's parentage action. Thus, the issue is whether Mr. P is or is not the legal father of TKY. The issues in the first appeal were limited to the petition to terminate the parental rights of Mr. P, if any. Though it was admitted, for the purposes of that action, that Mr. P was the "biological" father of TKY, there was no admission that he was the legal father or that he had parental rights. To the contrary, the purpose of that action was to forestall his pursuit of a claim of parental rights.

The subject of the sentence upon which Mr. P relies to make his "law of the case" argument did not pertain to the matters at issue in the first appeal. Therefore it is *dicta*, and it is not controlling. As a consequence, neither the trial court nor this court is precluded from making the determination, in this action, whether Mr. P or Mr. Y is the legal father of TKY.

THE LEGAL CRITERIA EMPLOYED BY THE TRIAL COURT

We will first ascertain whether the trial court employed the proper legal criteria to determine who is the legal father of TKY. Whether the trial court applied the proper legal criteria is a question of law, and we review questions of law *de novo* with no presumption of correctness. *Nelson*, 8 S.W.3d at 628.

In its ruling from the bench, the trial court expressly stated that it was constrained to hold that the biological father was the legal father unless "there had been no effort to establish support, no prior petitions filed, no effort" by Mr. P, the biological father. The trial court's perception of such constraints is further evident from the following excerpts of the trial court's ruling:

> I looked briefly, and *I could not find a case which involved a decision which was contrary to the DNA results*. The Russell case, the court found that the father who was the biological father was declared to be the legal father. . . .
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> . . . .
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> Well, it's clear even by stipulation that . . . [Mr. P] is the biological father of this child. I mean, that's the overwhelming evidence. It's by stipulation. It's by DNA results. It's by the acts and statements of the parties and the prior testimony and the testimony today. *It's clear that he is the biological father of this child*.
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> *[I]f there had been no effort to establish support, no prior petitions filed, no effort on . . .[Mr. P], I would find – probably find he is not the father, the legal father of the child.* He started this. He started it with a petition asking the Court to legitimate the child and asking the Court to establish or set support. That began back in . . . August of 1999. So for me to say that he was not willing to support the child really flies in the face of the facts. And that seems to be the one factor that the court in Russell thought was extremely important. So based upon that I'm going to have

> to find – *I think the law requires me to find . . . [Mr. P] is the father of the child.* So we need to go on to the other issues.
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> . . . .
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> There is no finding [from cases with similar fact patterns] that the putative father has not been declared to be the father of the child. I don't think there's any case to that effect. . . . (emphasis added)

It is evident from the above that the trial court's ruling in favor of Mr. P was based on three criteria: (1) there are no parentage decisions contrary to the DNA results; (2) Mr. P is the biological father; and (3) the law requires the court to find the biological father to be the legal father unless he has done nothing to establish or preserve the parent/child relationship. We, however, find the trial court restricted itself to an erroneously narrow legal criteria and placed too great an emphasis on the genetic tests when it determined that Mr. P was the "legal" father of TKY.

Tenn. Code Ann. § 36-2-304(a) provides that "a man" is rebuttably presumed to be the father of a child if:

> (1) The man and the child's mother are married or have been married to each other and the child is born during the marriage or within three hundred (300) days after the marriage is terminated by death, annulment, declaration or invalidity, or divorce.
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> . . . .
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> (4) While the child is under the age of majority, the man receives the child into the man's home and openly holds the child out as the man's natural child; or
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> (5) Genetic tests have been administered as provided in § 24-7-112, an exclusion has not occurred, and the test results show a statistical probability of parentage of ninety-five percent (95%) or greater.

As the statute expressly provides, a man is rebuttably presumed to be the father of a child if one of the foregoing factors is established; however, the statute does not make the genetic test more significant than the other statutory factors. Moreover, the statute does not address the situation, such as that at issue, where two or more men are rebuttably presumed to be the father.

Mr. Y is presumptively the father of TKY because he was married to the child's mother when the child was conceived and remains married to her presently. Tenn. Code Ann. § 36-2-304(a)(1). Further, Mr. Y has received the child into his home and openly holds the child out as his natural child. Tenn. Code Ann. § 36-2-304(a)(4). Thus, he has the benefit of two statutory presumptions. Conversely, Mr. P is presumed to be the father of TKY based upon genetic testing that indicates a 99.95% statistic probability of parentage. Tenn. Code Ann. § 36-2-304(a)(5).

Contrary to the legal conclusion reached by the trial court, Tenn. Code Ann. § 36-2-304(a) does not assign one rebuttable presumption more weight than another. Moreover, *Russell v. Russell*, No. M2000-01101-COA-R3-CV and M2000-01127-COA-R3-CV, 2001 WL 856584 (Tenn. Ct. App. July 31, 2001), the case upon which the trial court relied, does not mandate such a conclusion if and when two men are seeking to be named the "legal" father and at least one of them is relying on a presumption other than genetic testing.[10] While the statute provides no guidance to resolving situations such as this, where two men claim parentage of the same child, this court has previously identified factors to be considered when there are competing presumptions. *Cihlar v. Crawford*, 39 S.W.3d 172, 185 (Tenn. Ct. App. 2000) *perm. app. denied* (Feb. 20, 2001). They include:

(1) the stability of the child's current family environment,
(2) the existence of an on-going family unit,
(3) the source or sources of the child's support,
(4) the child's relationship with the presumptive father, and
(5) the child's physical, mental, and emotional needs.

Cihlar, 39 S.W.3d at 185.

Accordingly, when a man is seeking to be declared the father of a child, or when a woman or another is seeking to have a man declared the father of a child, the court should consider the statutory presumptions found in Tenn. Code Ann. § 36-2-304(a). However, where more than one man is seeking to be declared, or another is seeking to declare one of several men the father of a child, the court should consider not only the statutory presumptions found in Tenn. Code Ann. § 36-2-304(a) but also, if applicable, the factors pronounced in *Cihlar* that are relevant to the case.[11] It is evident from the record that the trial court did not consider, at least not on equal terms, the

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[10] It is most uncommon for two men to be competing for parental rights. In almost every case where two or more men are involved in a parentage action they are attempting to avoid the title of father.

[11] The legislature recognized the probability of competing interests when it enacted The Parentage Act. The Act was a comprehensive bill and "[a]lthough the Parental Act of 1997 reflects a legislative liberalization of the requirements imposed on biological fathers seeking legal recognition of their parentage, in no sense did the General Assembly retreat from its expressed policy favoring the importance of the traditional family unit." *Ardoin v. Laverty*, No. M2001-03150-COA-R3-JV, 2003 WL 21634419, *3 (Tenn. Ct. App. July 11, 2003)(citing *Chilar*, 39 S.W.3d at 180). Moreover, the legislature addressed the purpose of allowing a person who believes he is the biological father of a child born to a woman during her marriage to another man.

> A gentleman and lady lived together, I think it was for two years, ... and he fathered a child, he had no idea the woman was married and then in one of those miracles that do happen, the original spouse showed back up and the mother of the child by the second man said we are taking the child and you can no longer see him. The only father that the child knew for two years was this father and we think there needs to be some window of opportunity in which you can say 'yes, that's my child and I need to have some relationship with it....'

Ardoin, 2003 WL 21634419, at *4 (quoting a hearing before the Senate Judiciary Committee on May 13, 1997, concerning 1997 Tennessee Public Acts Chapter 477, House Bill 1073/Senate Bill 747).

statutory presumptions which favored Mr. Y. It is also evident that the trial court only considered one of several relevant factors pronounced in *Cihlar*.[12] Moreover, it is significant that the other relevant factors that were not considered favor Mr. Y.

We therefore hold that the trial court restricted itself to an erroneously narrow legal criteria and placed too great an emphasis on the genetic tests to reach its conclusion that Mr. P is the "legal" father of TKY. Applying an incorrect legal standard constitutes an error of law. *Johnson v. Nissan North America, Inc.*, 146 S.W.3d 600, 604 (Tenn. Ct. App. 2004). We will therefore conduct a fresh analysis to make our own determination of which one of these two men is the "legal" father of TKY.

WHO IS TKY'S "LEGAL" FATHER?

It is undisputed that Mr. P is the biological father of TKY; however, that fact alone does not make him the "legal" father of TKY with the accompanying rights and responsibilities. Both men competing for the title of "legal" father of TKY have the benefit of one or more rebuttable presumptions in Tenn. Code Ann. § 36-2-304(a), yet none of these are conclusive and none of these are superior to the others. Therefore, we will determine who is the "legal" father of TKY based on the relevant *Cihlar* factors.

The *Cihlar* factors relevant to this case include: the existence of a family unit, the stability of the family environment, sources of the child's support, the child's relationship with the presumptive father(s), and the child's physical, mental and emotional needs. *Cihlar*, 39 S.W.3d at 185.

TKY has resided in a safe, stable and loving environment in the home of Mr. Y since his birth in October of 1997. Mr. Y has been married to Mrs. Y since 1988. Despite some marital difficulties, due to Mrs. Y's conduct, Mr. Y considers his marriage to Mrs. Y "intact and strong" and he has no plans to seek a divorce.

The union of Mr. and Mrs. Y has produced a sister for TKY, who we identify as CY. She was born in March of 1999. Mr. Y testified that TKY and CY are "best friends and playmates." Thus, TKY is, and has been for his entire life, a member of a family unit that includes Mr. Y, Mrs. Y and CY.

Mr. and Mrs. Y have been TKY's sole source of financial support. Mr. Y is well educated and has an income that is more than adequate to provide for TKY. Together, Mr. and Mrs. Y produce a combined annual income of approximately $125,000. Mr. Y has supported TKY since his birth. Moreover, after Mr. Y became aware that he is not TKY's biological father, he nevertheless continued to provide financial support for TKY. Significantly and conversely, Mr. P has provided no support for the child whatsoever.

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[12] Ironically, that factor was support, and there is no evidence in the record of Mr. P supporting the child. There is only evidence of an "offer" to provide support, which was stated in Mr. P's petition that was filed twenty-two months after the child's birth.

By all accounts, Mr. Y is a doting, loving father who proudly holds TKY out as his child. Mr. Y testified, "I love that child, and I love my wife, and I love my daughter, and we have got a great family, and we want to keep it intact and healthy." It is undisputed that Mr. Y has demonstrated a high level of commitment to parenting TKY.

In contrast to the fatherly actions of Mr. Y, Mr. P has done nothing other than plant the seed, file a civil action, albeit belatedly, and "offered to provide" support for TKY. Mr. P, at best, was most tardy in his legal efforts to establish parentage, waiting almost two years after TKY's birth to initiate any legal proceedings to establish his paternity of TKY. Moreover, no valid reasons were given to justify the delay in pursuing his legal remedies, which we find significant since Mr. P has admitted that he had known "all along" that TKY was his biological child. Of further significance, and to aggravate Mr. P's deficiencies as a putative father, he has provided no support for TKY. Moreover, the evidence shows that Mr. P has the financial means to provide support, at least to some degree, but has failed to do so.[13] His financial support has been limited to an "offer" to provide support.

To compound his deficiencies, Mr. P not only has no relationship with TKY, he has not attempted to establish a relationship with TKY.[14] As of the April 2004 hearing, Mr. P had seen TKY twice since August 1999 – during two one-hour visits at McDonald's restaurant.

Significantly, the record indicates that the trial court did not consider the existence of a family unit, the stability of the family environment, the child's relationship with the presumptive father(s), or TKY's physical, mental, and emotional needs. As *Chilar* reasoned, these factors "enable the trier-of-fact to consider the level of commitment to parenthood that the presumptive father or fathers have demonstrated." 39 S.W.3d at 185.

We also find it significant that most of the factors that were not considered favor the conclusion that Mr. Y is TKY's legal father. We also find it imperative that the *Chilar* factors be considered. Two men are competing against each other for the title of the "legal" father and both carry the benefit of one or more statutory presumptions of being the "legal" father.

Based upon the foregoing analysis, we hold that Mr. Y has earned the right to the title of legal father of TKY.[15] Accordingly, we vacate the judgment of the trial court and remand this matter with

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[13]Mr. P has been self-employed at all material times and claims to earn approximately $27,000 a year. Moreover, at the time of the April 2004 hearing, he was living in a three bedroom apartment with his fiancé and his father. Thus, his living expenses were not significant.

[14]Mr. P admitted that he took no steps to arrange visitation with the child other than to ask his lawyer to arrange visitation. There are, however, no motions or letters in the record evidencing requests for visitation, nor is there any other testimony to corroborate Mr. P's statement.

[15]Our decision to recognize Mr. Y as TKY's legal father simply confirms the paternal relationship that has existed and thrived since the birth of TKY.

instructions to enter an order declaring that Mr. Y is the legal father of TKY and that Mr. P is not.

SUPPORT AND VISITATION

In addition to declaring Mr. P to be the father of TKY, the trial court's judgment established child support, set a visitation schedule and awarded a judgment against Mr. P for back child support and past medical expenses. Since Mr. P is not the legal father of TKY, Mr. P has no legal obligation to pay child support for TKY and he has no obligation for past child support or medical expenses. He also has no right to visit TKY as he is not a legal parent of TKY. Thus, the judgment of the trial court in respect to these matters is also vacated as such issues are rendered moot. Moreover, since Mr. Y is married to and lives with the mother of TKY, there is no need to establish visitation or support for Mr. Y.

IN CONCLUSION

The judgment of the trial court is vacated in all respects and the matter is remanded to the trial court with instructions to enter judgment denying Mr. P's petition to establish parentage and declaring, *nunc pro tunc* to the birth of TKY, that Mr. Y is the father of TKY.

Costs of appeal are assessed against Appellee, Mr. P.

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FRANK G. CLEMENT, JR., JUDGE